No. 92-[illegible]

In the Supreme Court of the United States

October Term, 1992

Northern Pine of the Confederated Pinetree Tribes Fund for Northern California,
Petitioner,

vs.

Mary Snow,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 82-104

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

PENSION PLAN OF THE CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA,
Petitioner,

VS.

MARY BRUG,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Mary Brug respectfully prays that the Court deny the Petition for a Writ of Certiorari filed by the Pension Plan of the Carpenters Pension Trust Fund for Northern California to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on February 12, 1982.

I

OPINION BELOW

The opinion of the Court of Appeals, a copy of which is attached as Appendix "A" to the Petition for Writ of Certiorari, is reported at 669 F.2d 570.

II

STATUTORY PROVISION

The relevant statutory provision is Section 404 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104.

III

STATEMENT OF THE CASE

Mary Brug (hereinafter "Brug") filed this action on December 1, 1976, predicating federal jurisdiction upon Sections 502(a)(1)(B) and 502(e)(1) of ERISA (29 U.S.C. § 1132(a)(1)(B) and 1132(e)(1)), naming the Pension Plan of the Carpenters Pension Trust Fund for Northern California (hereinafter "Pension Plan"), the Trustees of the Pension Plan and Carpenters Local Union No. 22 as Defendants. In her complaint Brug alleged that by deferring consideration of and subsequently denying her application for a pension after she had retired and qualified for pension benefits under the existing provisions of the Pension Plan, the Trustees and Pension Plan violated the governing instruments of the Plan and the fiduciary obligations set forth in ERISA, and acted arbitrarily, discriminatorily and capriciously.

On October 14, 1977 Brug filed a motion for summary judgment, and Defendants thereafter filed cross-motions for summary judgment. Following oral argument on the motions, the District Court dismissed Carpenters Local 22 as a party defendant and took under submission the motion and cross-motions as they related to the individual Trustee Defendants and to the Defendant Pension Plan. On January 19, 1978, the Court filed a Memorandum of

Decision denying Brug's motion and granting the Trustee Defendants' cross-motions.

Following further discovery, Brug renewed her motion for summary judgment. On March 22, 1979 the District Court denied the renewed motion for summary judgment.

Pursuant to leave of Court, Brug on August 27, 1979 filed a First Amended Complaint for declaratory judgment, damages and injunction. In her First Amended Complaint, which named the Pension Plan as sole Defendant, Brug alleged that her application for a disability pension under the Pension Plan came before the Trustees' Pension Approval Committee at its regular meeting on March 16, 1976 after Brug had satisfied all the requirements for a disability pension and had retired; that the Committee deferred action on Brug's application; that the Trustees thereafter rescinded the Pension Plan provision which entitled Brug to participate in the Pension Plan and summarily denied Brug's application on the basis of the Trustees' modification of the Pension Plan. Brug alleged that the deferral and denial of her application for a pension was arbitrary, discriminatory and capricious and in violation of the governing instruments of the Pension Plan and Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1).

The case was tried by the District Court sitting without a jury on March 26, 27 and 28, 1980. On June 9, 1980, the Court issued an order denying Brug's claims for relief in their entirety. Judgment was entered the same day.

On June 18, 1980, Brug filed a notice of appeal. The appeal was argued before the United States Court of Appeals for the Ninth Circuit on December 15, 1981. On February 12, 1982 the Court of Appeals issued an opinion

reversing the judgment of the District Court. The Court of Appeals held that the Trustees did not have the authority under the Pension Plan and Trust Agreement to apply amended pension eligibility provisions so as to deny Brug pension benefits that had vested before the Trustees amended the Plan.

On April 16, 1982 the Court of Appeals issued an order denying the Pension Plan's petition for rehearing and suggestion for rehearing *en banc*.

IV
STATEMENT OF THE FACTS

A. Employees Of The Carpenters Union Participate In The Pension Plan Pursuant To Express Provisions Of The Trust Agreement

The Carpenters Pension Trust Fund for Northern California is a jointly administered employee benefit trust created by a Trust Agreement executed in 1957 by various contractors associations and Carpenters Union District Councils and Locals. The Trust Agreement, as amended December 1, 1965, expressly allows Local Unions, District Councils and other labor organizations affiliated with the Carpenters Union to make pension contributions to the Trust Fund on behalf of their employees. *The Trust Agreement does not restrict or limit in any way the categories or classifications of Union employees for whom such pension contributions may be made.*

The Pension Plan mirrors the Trust Agreement in providing, at Article II, for contributions to the Pension Trust Fund by any Local Union or District Council on behalf of its employees, without limiting the classifications of employees for whom contributions may be made.

Pursuant to the foregoing provisions of the Trust Agreement and Pension Plan, officers and business agents of the Carpenters Union have had pension contributions made to the Pension Plan on their behalf since 1965. In addition, various other individuals employed by Union affiliates or related labor organizations have participated in the Pension Plan, including, apparently, at least one office clerical employee. Prior to June 1, 1975, however, Local Unions and District Councils were not *required* to contribute to the Pension Trust Fund on behalf of their office clerical employees.

In 1974, following an audit, the Internal Revenue Service advised the Trustees that contributions to the Pension Plan by certain Local Unions and District Councils failed to comply with the coverage requirements of the Internal Revenue Code and discriminated in favor of highly compensated officers and business agents and against office clericals employed by the Union, some of whom had no retirement program at all. Union business agents, fearing disqualification of their pension contributions, urged the Trustees to include the office clericals in the Pension Plan. At the same time the business agents advised the Trustees that they did not want to have to pay pension contributions to the Trust Fund to fund the office clericals' past service with the Union back to 1957, when the Pension Plan was established.

While the possibility of amending the Plan to require inclusion of clerical employees of any Local Union or District Council that contributed for its officers and other employees was being discussed, the Trustees directed their financial consultants to prepare a survey of pension cov-

erage for clerical employees of Carpenters Local Unions and District Councils in Northern California. The survey confirmed that some office clerical employees of the Union had no pension plan at all, nor any retirement benefits; others had some pension coverage under a collective bargaining agreement between the Office Employees Union, as their collective bargaining representative, and the Carpenters Union, as their employer. The survey revealed that there were between 70 and 80 office clericals employed by the Union in Northern California, the number potentially affected by a Plan amendment requiring clericals' participation.[1]

The Trustees then asked their actuaries for a report on the financial impact of covering the clericals and granting them past service credit—for which no contributions would be made—for their years of service with the Union prior to the effective date of their coverage. The actuaries reported that the financial impact on the Trust Fund would be "minimal."

After months of discussions, the Trustees, at a meeting on August 26, 1975, attended by cocounsel and the actuaries, formally adopted Amendment 13 to the Pension Plan. Amendment 13 was drafted by co-counsel to the Trustees, who had advised the Trustees that the office clericals ought to be covered under the Pension Plan, in view of the probable insistence by the IRS that office clericals be given pension parity with full-time officers of the Union.

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[1]Some 40,000 to 50,000 Carpenters working under collective bargaining agreements participated in the Pension Plan, and 5,000 employers contributed.

Amendment 13 made minor modifications in certain provisions of the Pension Plan, but restated unchanged the operative definitions of the terms "Employee," "Individual Employer," and "Covered Employment," which already allowed for pension contributions to the Trust Fund on behalf of Union employees *without restriction*. Although clerical employees were not expressly mentioned in Amendment 13, the avowed purpose of the Amendment was to require their inclusion where contributions were made for other employees of Local Unions, District Councils and the State Council of Carpenters and thus to create a "parity" of pension coverage as between clericals and other employees of the Union.

The Trustees' rules and regulations implementing Amendment 13 granted the clericals past service credit for employment with the Union prior to June 1, 1975, and required Local Unions, District Councils and the State Council of Carpenters to contribute to the Pension Plan for the clericals' hours of service after June 1, 1975. The rules and regulations also provided for vesting of benefits under the Plan after 350 hours of credited service in the twelve months following June 1, 1975 and required that pension applications be filed with the Trustees at least one month in advance of the first month for which benefits were payable.

On September 12, 1975, the Trustees advised all Local Unions, District Councils and the State Council of Carpenters in writing that if they wished to contribute to the Pension Plan for any of their employees or officers, they would be required to contribute for *all* full-time employees and officers, retroactive to June 1, 1975.

Following adoption of Amendment 13, five office clerical employees employed by various Local Unions, a District Council and the State Council of Carpenters applied for and were granted retirement benefits under the Pension Plan. One of these individuals is now deceased. The other four are still receiving pension benefits under the Plan.

B. The Trustees Deny Brug's Pension Application On The Basis Of A Plan Amendment Adopted After Brug Applied And Qualified For Pension Benefits

Mary Brug was employed by Carpenters Union Local 22 from March 4, 1963 to January 31, 1976 as a stenographer. Like the other clerical employees of the Union who applied for and were granted retirement benefits under the Plan, Brug was a member of the Office Employees Union and worked under a collective bargaining agreement between that Union and her employer, Carpenters Local 22.

In September, 1975 Brug learned that clerical employees of Carpenters Local Unions and District Councils were now covered under the Carpenters Pension Plan and that Local 22 had started making monthly contributions to the Pension Trust Fund on her behalf, effective June 1, 1975. She also learned that she would be given credit under the Plan for her employment with the Union prior to June 1, 1975.

On November 13, 1975 Brug, who had been thinking about retiring, went to the Carpenters Trust Fund office at 995 Market Street in San Francisco and filled out a pension application with the assistance of Michael Pearce, supervisor of the Pension Department of the Carpenters

Trust Funds administrative office in San Francisco. Pearce told Brug that she would qualify for an early retirement pension effective January 1, 1976.

A few days later Pearce advised Brug that she did not qualify for an early retirement pension because she did not have sufficient years of service, or for a normal pension, since she was not yet 65 years old. Pearce stated that in view of her health problems, however, Brug would qualify for a disability pension if she first qualified for Social Security disability benefits.

On November 19, 1975, Brug applied for Social Security disability benefits. On February 10, 1976 she was notified that she had been awarded Social Security disability benefits. She immediately notified Pearce, who stated that Brug "was in the ball game," that she was o.k., and that there was nothing to worry about.

On February 11, 1976 Brug called Pearce and asked him whether she would be required to fill out another pension application, since her original application indicated that she was applying for an early retirement pension. Pearce assured her that it was not necessary to fill out another application. He told her that "everything was in order," that she had fulfilled all the requirements for eligibility for a disability pension in the amount of $255 per month, effective February 1, 1976. Pearce assured Brug that her pension application only had to be approved by the Pension Approval Committee, which was "automatic."

After receiving Brug's evidence of her qualification for Social Security disability benefits, Mr. Pearce and his staff of pension analysts reviewed Brug's application in light of the eligibility requirements of the Pension Plan and

placed it on a list of applications to be presented to the Trustees' Pension Approval Committee for approval at their March 16, 1976 meeting.

The Pension Approval Committee, composed of two Employer and two Union Trustees, meets bimonthly to act on pension applications. At its March 16, 1976 meeting the Pension Approval Committee considered all pension applications on the agenda except Brug's. It approved all pension applications presented to it with a recommendation for approval from Pearce's department except for Brug's. There was no discussion whatsoever with respect to Brug's application. Rather, Union Trustee John Rebeiro, Chairman of the Pension Approval Committee at that time, moved to recess the meeting without considering Brug's application at all, in order to allow time to convene the full Board of Trustees to rescind Amendment 13. The Trustees would then have a basis on which to deny Brug's application. The members of the Pension Approval Committee had no doubt at that time that Brug was entitled to a disability pension under the rules then in existence. Under Amendment 13 Brug qualified for a pension. Further, the Trustees knew that granting her benefits would not have impaired the assets of the Trust Fund.

Immediately after the March 16, 1976 Pension Approval Committee meeting, the Trustees scheduled a special meeting of the full Board to reconsider and rescind Amendment 13 before Brug's pension application was reviewed. Pursuant to notice the full Board met specially on March 23, 1976. The new Union cocounsel to the Trustees announced that Amendment 13 was illegal. The Trustees then voted not to accept any further contributions on behalf of clerical

employees, to refund contributions that had been made and to advise contributing unions that clerical employees would not be covered under the Plan. The Trustees decided not to challenge the pensions of the five office clerical employees who had already been granted retirement benefits.

Immediately after the special meeting of the full Board of Trustees on March 23, 1976, the Pension Approval Committee met again. Solely on the basis of the action of the full Board effectively rescinding Amendment 13 that same day, the Trustees denied Brug's pension application.

Following notification that the Trustees had denied her pension application, Brug filed an appeal. The appeal was rejected by the Trustees' Appeals Committee on August 24, 1976.

V

REASONS WHY THE PETITION SHOULD BE DENIED

A. There Is No Conflict Between The Decision Below And This Court's Decision In Arroyo v. United States, 359 U.S. 419 (1959) Or The California Court of Appeal's Decision In French v. Construction Laborers Pension Trust, 44 Cal.App.3d 479 (1975)

The Pension Plan predicates its Petition upon the premise that Amendment 13 to the Pension Plan, which provided for participation of clerical employees such as Brug, violated the underlying Trust Agreement, and that the Court of Appeals' decision requiring payment of pension benefits to Brug constitutes an order to the Trustees to spend Trust assets without proper authority.

The Pension Plan's contention is without merit. The Court of Appeals considered and rejected the same argu-

ment below, concluding that Article I, Section 4 of the Trust Agreement, defining covered employees, is "clear and unambiguous." Article I, Section 4, provides as follows:

> The term 'Employee' shall also include employees of Local Unions and District Councils, and employees of labor councils and other labor organizations with which a Local Union or District Council is affiliated, on whose behalf contributions are made to the Pension Fund pursuant to regulations adopted by the Board of Trustees; provided the inclusion of any said employees is not a violation of any existing law or regulation.

The Pension Plan contains an identical provision.

As the Court of Appeals observed, there is no contention in this case that inclusion of the clerical employees violated any existing law or regulation.

Thus, the Trust instruments do not exclude clerical employees of the Union from participation in the Pension Plan. On the contrary, they allow participation of employees of the Carpenters Union, without restriction to Union business representatives and officers. Therefore, by allowing clerical employees such as Brug to participate, the Trustees did not expend the assets of the Trust Fund for purposes other than those for which the Fund was established, nor did the Trustees purport to alter, change or modify the Trust Agreement without the concurrence of the Trustors. The Trustees did not go beyond the bounds of the original Trust Agreement, but strictly adhered to the coverage provisions of that instrument in adopting Amendment 13. Accordingly, the Court of Appeals' decision protecting Brug's vested rights under Amendment 13 is not in conflict with this Court's decision in *Arroyo v. United States*, 359 U.S. 419 (1959), or the California Court

of Appeal's decision in *French v. Construction Laborers Pension Trust*, 44 Cal.App.3d 479 (1975).

B. The Decision Of The Court Of Appeals Does Not Conflict With Established Case Law In The Ninth Or Other Circuit Courts Of Appeals Concerning The Trustees' Discretionary Powers.

The Trust Agreement includes in the definition of employees covered under the Plan employees of the Union *without restriction*. As the Court of Appeals held, that language is clear and unambiguous. Accordingly, authorities cited by the Pension Plan for the proposition that Plan Trustees may decide between conflicting interpretations of the Plan, so long as their interpretation is not arbitrary and capricious, are inapposite. As the Court of Appeals held, the Trustees had the authority under the Plan to rescind Amendment 13, but they could not apply their action retroactively, to deny pension benefits to a Plan participant whose rights had vested in the meantime.[3]

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[3]The Pension Plan's illegality argument is further undercut by its own treatment of the other clerical employees who applied for and were granted pension benefits. Estoppel arguments notwithstanding, if Amendment 13 were not authorized by the Trust Agreement, the Trustees would have been *required* to terminate the pensions of the other clericals. *Aitken v. I. P. & G. C. U.-Employer Ret. Fund*, 604 F.2d 1261 (9th Cir. 1979); *Moglia v. Geoghegan*, 403 F.2d 110, 117 (2d Cir. 1968), *cert. den.*, 394 U.S. 919 (1969); *French v. Construction Laborers Pension Trust, supra*. In fact those other former clerical employees of the Union continue to draw pension benefits from the Pension Plan, a tacit admission by the Pension Plan that Amendment 13 was properly adopted.

C. The Decision Of The Court Of Appeals Does Not Conflict With This Court's Decision In United Mine Workers of America Health And Retirement Funds v. Robbinson, 102 S.Ct. 1226 (1982)

The Pension Plan argues that the Court of Appeals' decision is inconsistent with a *subsequent* decision of this Court, *United Mine Workers of America Health and Retirement Funds v. Robinson*, 102 S.Ct. 1226 (1982), in that the Trustees' denial of Brug's pension application constituted permissible discrimination in favor of bargaining unit employees as required by the Trust Agreement. The only problem with the Pension Plan's argument is that, once again, it tries to read into the Trust Agreement restrictions which do not exist. Employees of the Union are authorized to participate in the Pension Plan, regardless of classification. Brug was an employee of the Union. The Trust Agreement not only did not exclude her but affirmatively allowed her participation in the Plan.

D. The Decision Of The Court Of Appeals Does Not Conflict With The District Of Columbia Circuit's Decision In Pete v. United Mine Workers Of America Welfare And Retirement Fund, 517 F.2d 1275 (D.C.Cir. 1975)

Pete v. United Mine Workers of America Welfare and Retirement Fund, 517 F.2d 1275 (D.C.Cir. 1975), addressed the issue of whether a pension plan provision requiring a certain period of contributory employment as a condition of eligibility for retirement benefits under the plan was arbitrary and capricious. Unlike this case, Pete did not concern *retroactive application* of an eligibility requirement to deny pension benefits to a plan participant who qualified for a pension before the requirement was adopted.

Here, as the Court of Appeals held, the Trustees had the discretion to grant benefits to clerical employees of the Union based upon their employment by the Union prior to the date that contributions to the Pension Plan for clerical employees commenced.

> The Pension Plan provided for pension credit for service before the designated contribution date for other employees as well. It is the nature of a pension plan such as this one to provide benefits for periods of service for which no contributions are specifically made or required. This plan provided such benefits, including death benefits, disability pensions, credit for past service, credit for service in the armed forces, and partial pensions based on credited service with other related plans. This type of benefit has to be based upon actuarial probabilities, not specific contributions for specific employees.

(Appendix "A" to the Petition, pp. 21-22.)

Moreover, the Trustees, in consulting with their actuaries prior to adopting Amendment 13, were advised that granting past service credit to the office clericals, including those who had long years of service and were near retirement, would have a *minimal* impact on the Trust Fund.

This is not a case where the Court below in any sense attempted to second-guess the Trustees' adoption of reasonable eligibility rules; the Court of Appeals held that the Trustees had the discretion both to adopt and to rescind Amendment 13. What is at issue is the *manner* in which the Trustees chose to apply their action. The Court of Appeals properly held that the Trustees acted arbi-

trarily and capriciously in denying Brug a pension on the basis of a modification of the Pension Plan eligibility rules enacted *after* Brug applied for benefits and met the eligibility requirements then in place. Its decision is correct and consistent with other reasoned decisions of the Courts of Appeals. *See, e.g., Burroughs v. Bd. of Trustees of Pension Trust, Etc.*, 542 F.2d 1128, 1131 (9th Cir. 1976), *cert. den.*, 429 U.S. 1096 (1977); *Danti v. Lewis*, 312 F.2d 345, 349 (D.C.Cir. 1962); *Kiser v. Huge*, 517 F.2d 1237, 1246 (D.C.Cir. 1974); *Stacey v. Combs*, 671 F.2d 602, 606 (D.C.Cir. 1982).

VI

CONCLUSION

The Pension Plan has not suggested any substantial basis for this Court's review of the decision below, and in fact none exists. The Petition should therefore be denied.

Dated: August 13, 1982

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